

**FINDINGS AND DECISION OF THE HEARING EXAMINER
FOR THE CITY OF KIRKLAND**

In the Matter of the Appeals of

File Number:
CON10-00004

**ATIS FREIMANIS; ROBERT STYLE;
RANDALL COHEN; LAURA and CHARLES
LOOMIS; CHARLES GREENE; KAREN and
HUGH LEVENSON; CYNTHIA GLASER;
DIONE GODFREY and VASHTI KEY; ROBIN
HERBERGER and CHUCK PILCHER**

from a concurrency determination issued by the Director
of the Department of Public Works

Introduction

The Director of the Department of Public Works issued a concurrency test decision for a proposed development commonly referred to as "Potala Village". The Appellants timely appealed the decision.

The appeal hearing was held on November 17, 2011 before the Hearing Examiner (Examiner). Appellants Atis Freimanis, Robert Style, Laura and Charles Loomis, Charles Greene, Karen and Hugh Levenson, Cynthia Glaser, and Robin Herberger and Chuck Pilcher represented themselves. Appellants Dione Godfrey and Vashti Key were represented by Peter Powell. Appellant Randall Cohen was not represented at the hearing. The Applicant, Lobsang Dargey and Dargey Enterprises, LLC, was represented by Kristine R. Wilson, attorney-at-law. The Director of the Department of Public Works (Department), was represented by Robin S. Jenkinson, City Attorney. The Examiner inspected the site prior to the hearing.

The Applicant and Department filed motions to dismiss many of the appeal issues, and four of the Appellants filed responses to the motions. The Examiner heard argument on the motions at hearing but deferred issuance of an order on them to this decision. The appeal record was held open to November 28, 2011 for the Applicant to file and serve documents demonstrating the Applicant's ownership/leasehold interest in the project parcels, and the decision deadline was extended accordingly.

After considering the evidence in the record and inspecting the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Transportation Impact Review

1. Pursuant to the Growth Management Act, Chapter 36.70A RCW (GMA), the City adopted a comprehensive plan (Plan) that includes certain required elements, including a transportation element and a capital facilities element. *See* RCW 36.70A.070. As required by the GMA, the Plan includes within the transportation and capital facilities elements level of service standards for the City's transportation system. *See* RCW 36.70A.070(6)(a)(iii)(B). These level of service standards were most recently updated in 2004.
2. In accordance with RCW 36.70A.070(6)(b), the City adopted Chapter 25 KMC, governing concurrency management, to carry out the GMA mandate that road improvements or strategies to accommodate the impacts of development are made concurrent with the development. "Concurrent with development" means that any needed improvements or strategies are in place at the time of new development or redevelopment, or that a financial commitment is in place to complete the improvements or strategies within six years. *Id.* KMC 25.06.080 adds that the facilities or strategies that achieve the adopted level of service standards must be planned in the Plan at the time the Department approves a development. Chapter 25 KMC was most recently updated in 2004.
3. The City reviews a development proposal's transportation impacts under two processes. The first process is concurrency review by the Department, which compares the critical, or highest, PM peak hour traffic volume capacity of "designated system intersections" within the City to the total critical PM peak hour traffic volume expected to travel through those intersections with the development in place. "Designated system intersections" include all signalized intersections within the City other than those listed in Table T-4 on page IX-17 of the Plan's transportation chapter. The designated intersections are shown in Exhibit 2.
4. Concurrency review is a macro level review of a proposal's potential impacts on the City's transportation system. It determines whether system-wide transportation improvements are needed to accommodate the proposal's anticipated traffic while maintaining the City's adopted levels of service (volume to capacity ratios).
5. "[B]efore the city will consider an application for any development permit or building permit to be complete," all development applicants must apply for and pass a concurrency test. KMC 25.10.010. The applicant submits a concurrency test application together with development trip generation information, the location of the project, a description of the proposed land uses, driveway locations, and the anticipated build out year for the project. Trip generation rates for proposed land uses are normally obtained from the Institute of Transportation Engineers (ITE) Trip Generation report, a compilation of trip generation data derived from many studies of trips generated by

various land use categories. *See Exhibit 11.* The Department then reviews the selected trip generation rates. If the rates are approved, the development's PM peak hour trips and approximate location are entered into the traffic model used by the cities of Bellevue, Kirkland and Redmond (the BKR model). The model calculates the development's anticipated trip distribution to designated system intersections.

6. To determine the development's impact on each intersection, the Department calculates level of service by first adding together the existing traffic count for the intersection during the critical PM peak hour, an annual growth factor of 1.5%, all development within the "pipeline," and the trips that will be generated by the development, and then factoring in any funded six-year CIP projects. ("Pipeline projects" are those that have passed a concurrency test but have not yet been constructed, or have been constructed but are not yet included within the existing traffic count.)

7. The City's LOS standards to determine capacity are found in Tables T-2 and T-3 of the Plan's transportation chapter. A development passes the traffic concurrency test if, with the development, no signalized system intersections exceed a volume to capacity ratio of 1.4, and the average subarea volume to capacity ratio of signalized system intersections does not exceed the adopted average volume to capacity ratio of each respective subarea as shown in the Plan. *See Exhibit 9 at IX-15 to IX-16.* If a proposal passes the concurrency test, the applicant may proceed through the rest of the application process.

8. The second review of a development's transportation impacts is initiated by the Department of Planning and Development pursuant to the State Environmental Policy Act, Chapter 43.21C RCW (SEPA). This review examines localized impacts in and near the proposal, and includes examination of both signalized and unsignalized intersections with one percent or more development proportional impact. Level of service is evaluated in terms of standards keyed to letter grades that represent relative lengths of delay. SEPA review also includes an analysis of development impacts upon non-motorized traffic, access, traffic safety, delay/queuing and parking, and examines short-term impacts such as those from construction activities.

Site and Proposal

9. The proposal site is located at the southeast corner of Lake Street South and 10th Avenue South and consists of parcels addressed as 1006, 1008 and 1020 Lake Street South and 21 10th Avenue South. It is currently developed with a 1,500 square foot commercial building and a single-family home. The site is designated as a "residential market" commercial area in the Plan, which is intended to serve the local neighborhood. However, the property is zoned Neighborhood Business, which restricts the types and square footage of retail uses, but does not limit the number of residential units.

10. According to a post-hearing real estate document submitted by the Applicant, he entered into a 99-year ground lease of the property addressed as 1020 Lake Street South

on September 1, 2010. The declaration of David Myaskovsky, also submitted post-hearing by the Applicant, indicates that the Applicant is the owner of the remaining parcels, having entered into a purchase and sale agreement for them in July of 2010, with the sale closing in January of 2011.

11. The Applicant proposes to remove the existing structures and paved lot and to construct a 30-foot mixed use building on the site, with approximately 6,200 square feet of general and medical office use and 143 residential units, along with underground parking for 316 vehicles that is accessed from Lake Street South.

12. The Applicant applied for a concurrency test for Potala Village in November of 2010, with the knowledge of the prior owner, and paid the application fee on December 21, 2010. Exhibit 5. A transportation consultant prepared an estimate of trip generation for the proposal based on ITE Trip Generation figures for apartment and shopping center land uses. (Tenants for the retail portion were unknown at the time, so a "worst case" scenario was used for the retail portion of the trip generation figures.) Exhibit 5. Table 1 of Exhibit 5 shows that the proposal was expected to generate 120 trips during the PM peak hour. However, the Department determined that no reduction should be allowed for internal trips between the proposed residential and commercial uses and concluded that the proposal would generate 128 PM peak hour trips. This was the number used in the concurrency test.

13. The concurrency test determined that with the Potala Village development in place, the highest volume to capacity ratio at a designated system intersection would be 1.14, and that none of the volume to capacity standards for the subareas would be exceeded. Exhibit 13 at 9. Thus, the proposal passed the test.

14. In April of 2011, the Applicant notified the Department of changes to the expected land uses within Potala Village, reducing the number of apartment units and changing the retail to medical and general office use. The updated trip generation figures showed that the proposal would generate 107 PM peak hour trips, or 13 fewer trips than previously estimated. Exhibit 7. Because the number of PM peak hour trips was reduced, the Department determined that the revised proposal would also pass concurrency if tested and simply issued an update to its concurrency test notice. Exhibit 6.

15. The Department provided a Notice of Road Concurrency Test Decision for the Potala Village proposal in conjunction with issuance of a determination of significance under SEPA on October 4, 2011.

Appeals and Motions

16. Nine timely appeals and three timely appeal amendments of the road concurrency test decision for Potala Village were filed. The appeals raised many issues and are included as Attachments 2 through 10 to Exhibit 1, the staff report submitted pursuant to KMC 25.23.070.

17. KMC 25.23.010 provides that a concurrency test decision may be appealed, but that the following issues may not be raised in such an appeal:

- (1) The methodology of the concurrency test in the comprehensive plan and in this title is incorrect;
- (2) The adopted level of service established in the comprehensive plan is incorrect; and
- (3) A provision of this title is incorrect or invalid.

18. Citing KMC 25.23.010, the Department moved to dismiss all appeal issues that relate to the City's road concurrency methodology and adopted LOS standards as beyond the jurisdiction of the Examiner. The Applicant made a similar motion but also moved to dismiss all appeal issues that are beyond the scope of concurrency review and thus outside the Examiner's jurisdiction on appeal of a concurrency test decision. The Applicant also questioned whether the Appellants meet traditional standing requirements to raise such issues.

Conclusions

Motions to Dismiss

1. It can be difficult to distinguish between the issues addressed in concurrency review and those addressed during environmental review. Consequently, the Appellants have (understandably) raised numerous issues in their appeals that are outside the scope of the concurrency test decision, and therefore outside the jurisdiction of the Examiner on review. These include all driveway/access and parking-related issues; all issues addressed to impacts on pedestrians, bicyclists or multimodal transportation; all land use-related issues, including density and associated transportation impacts; all housing issues; all environmental issues, including existing contamination or the potential for contamination on, or from the site; all traffic and transportation issues other than those included within the concurrency test decision, including increases in traffic, congestion/traffic backup, impacts from construction-related traffic or moving vans; and all issues related to funding for transportation improvements. Some or all of these issues may be addressed by the City pursuant to SEPA. However, because they are outside the scope of the Examiner's jurisdiction on review of a concurrency test decision, they must be dismissed. In light of this conclusion, it is unnecessary to consider the Applicant's standing argument.

2. The appeals also raise issues that, under KMC 25.23.010, cannot be raised in an appeal of a concurrency test decision for a specific project. The concurrency test methodology and levels of service in the Plan were subject to appeal when the Plan or relevant updates were adopted. Similarly, the provisions of Chapter 25.23 KMC were subject to appeal when the chapter or relevant updates were adopted. Those appeal periods have expired, and appeal issues that raise questions about such matters are

outside the scope of the Examiner's jurisdiction in this appeal. These include issues concerning particular intersections not included within the methodology; questions about the model's accuracy and whether it can be manipulated; issues related to the fact that the concurrency test does not address pedestrian or bicycle traffic or multimodal transportation; issues related to the fact that the test does not consider the need for fire, police, health and school services; issues concerning the consistency between the City's concurrency management policy and the GMA; issues questioning the peak time used in the test; and issues concerning the fact that the model does not account for seasonal variations in traffic flow. These issues challenge the methodology of the concurrency test in the Plan and Chapter 25.23 KMC, the adopted LOS in the Plan, and/or the validity of provisions in Chapter 25.23 KMC. Under KMC 25.23.010, they may not be raised in an appeal of a concurrency test decision, and the Examiner lacks jurisdiction to consider them. Therefore, these appeal issues must be dismissed.

Remaining Appeal Issues

3. KMC 25.23.080 provides that in the appeal of a concurrency test decision, the Examiner is to accord substantial weight to the Department's decision. The Code does not provide guidance on the applicable burden of proof. However the appeal process for the Department's concurrency test decisions is similar to the Type 1 appeal process prescribed for appeals of certain decisions made by the Planning Director. KCC 145.95 states the burden of proof for such appeals as follows: "The person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision." The Examiner will apply the same burden of proof to these concurrency test decision appeals while also according substantial weight to the Department's decision.

4. The Examiner may affirm, reverse or modify the concurrency test decision, and the Examiner's decision "shall be the final decision on any appeal of a concurrency test decision." KMC 25.23.080(5) and (8).

5. Appellant Freimanis claimed that the Applicant made misrepresentations at the time of the November, 2011 application for a concurrency test. At hearing, he focused on the issue of whether the Applicant owned or had the right to use the subject properties for the proposed development. Appellant Freimanis submitted evidence showing that the sale of two of the parcels had closed after the date of the concurrency test application and that the remaining parcel was owned by another party. *See Exhibits 30-35.* However, the declaration and ground lease submitted by the Applicant after the hearing establish that he had the requisite interest in the property to request the concurrency test, particularly in light of the fact that the prior owner of two of the parcels had no objection to the Applicant's test application.

6. No evidence was submitted to support the claim that the Applicant failed to "correctly revise and re-submit their application to reflect critical details and the true nature of the proposed development." Freimanis Appeal at 1. In fact, the record shows that the

changes made to the proposal would result in fewer PM peak hour trips and thus, it was unnecessary to repeat the concurrency test for the revised application.

7. Several Appellants questioned the accuracy of the data input into the test, specifically citing the trip generation data as suspect. However, it is not sufficient for an appeal to raise questions about a traffic consultant's use of ITE trip generation data without demonstrating that the ITE data is flawed and/or presenting alternative trip data gathered through an equally credible process. The Appellants have not met their burden of proof on this issue.

8. Most Appellants raised the issue of whether the concurrency test failed to take into account other potential projects, including development of the Yarrow Bay Business Districts, potential additional development on the South Houghton Slope, and the widely discussed transit-oriented development at the South Kirkland Park and Ride lot. It is true that the Department did not consider these projects but the record shows that they were excluded because they are not yet "pipeline projects," i.e., they have not yet passed a concurrency test and thus, road capacity has not been reserved for them. The Department's approach was not shown to be in error.


9. The record does not show that the Department's concurrency decision was incorrect, and it should therefore be affirmed.

Order and Decision

The motions to dismiss are granted, and the appeal issues listed in Conclusions 1 and 2 above are DISMISSED.

The Department's concurrency test decision for the Potlatch Village project at 1006, 1008 and 1020 Lake Street South and 21 10th Avenue South is AFFIRMED.

Entered this 2nd day of December, 2011.


Sue A. Tanner
Hearing Examiner

Exhibits

The following exhibits were entered into the record:

Exhibit 1	Department of Public Work's Staff Report with 15 attachments
Exhibit 2	Concurrency Intersections map

- Exhibit 3 Aerial Map showing orientation of project site and surrounding development
- Exhibit 4 Aerial Map with annotation of distance between project site and intersection of Lake Street and Central Way
- Exhibit 5 Concurrency Application submitted December 21, 2010
- Exhibit 6 Concurrency Test Decision dated April 7, 2011
- Exhibit 7 Transpo Group memo dated April 25, 2011
- Exhibit 8 Transpo Group TIA dated May, 2011
- Exhibit 9 Comp. Plan Chapter IX, "Transportation," pages 14-17
- Exhibit 10 Comp Plan Chapter XIII, "Capital Facilities"
- Exhibit 11 Trip Generation ITE Information
- Exhibit 12 Traffic Impact Analysis Guidelines dated February, 2004
- Exhibit 13 Department power point for 11/17/11 appeal hearing on Potala Village Concurrency Decision
- Exhibit 14 Comprehensive Plan Figure LU-2: "Commercial Areas"
- Exhibit 15 Comprehensive Plan, page VI-14, re Commercial Land Uses
- Exhibit 16 Undated page from power point entitled "The Growth Management Act: Transportation and Concurrency"
- Exhibit 17 Facsimile page dated March 25, 2004 concerning review of a prior proposal at the project site
- Exhibit 18 Comprehensive Plan, page III-1, "Plan Applicability and Consistency"
- Exhibit 19 Comprehensive Plan, page VI-19 re Land Use Policy for residential markets
- Exhibit 20 King County Assessor Real Property Record for part of project parcel with a notation re potential density
- Exhibit 21 Comprehensive Plan, page IX-33, listing "Project Descriptions for the 2022 Transportation Project List (Funded-Unfunded) (Continued)"
- Exhibit 22 Packet of 4 maps: "Priority Corridor Network for Pedestrian Planning" (2001); "Elementary School Walk Routes" (March 28, 2001); "Kirkland Nonmotorized Transportation Plan," "Bicycle Facilities" (undated Update); and "Kirkland Nonmotorized Transportation Plan," "Pedestrian Facilities" (undated Update).
- Exhibit 23 Two pages from Concurrency Application, Exhibit 5, with annotations
- Exhibit 24 Three pages from "64-Acre Tract Intermodal Transit Center EIR/EIS/EIS" showing use of seasonal peak hour trip rates in Lake Tahoe area
- Exhibit 25 Three pages from Executive Summary of "SR 20/Kibbe Road Intersection and Haul Road Traffic Study" showing use of seasonal peak hour trip rates in California
- Exhibit 26 One page from "Traffic and Vehicle Data Systems Unit, 2009 All Traffic Volumes on CSHS", showing use of seasonal peak hour trip rates in California
- Exhibit 27 One page from Merriam-Webster dictionary, definition of "peak"
- Exhibit 28 One page from City of Hughson, California, TIA Guidelines
- Exhibit 29 KMC 25.04.010
- Exhibit 30 Chapter 25.10 KMC, "Concurrency Test"

- Exhibit 31 2009 Concurrency Management Review Application form with highlighting
- Exhibit 32 Five pages from Concurrency Application (Exhibit 5) with highlighting and annotations
- Exhibit 33 King County Parcel Data for 1006 Lake Street South with highlighting
- Exhibit 34 King County Parcel Data for 21 10th Avenue South with highlighting
- Exhibit 35 King County Parcel Data for 6700 Lake Washington Boulevard with highlighting
- Exhibit 36 "Commercial Level 1st Floor Plan" for Potala Village project with highlighting.

PARTIES OF RECORD:

Appellants:

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Robert Style, 6735 Lake Washington Boulevard, Kirkland, WA 98033
Randall Cohen and Karen Mannering, 905 Lake Street South, #202, Kirkland, WA 98033
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Chuck Pilcher, 10127 NE 62nd Street, Kirkland, WA 98033

Applicant: Lobsang Dargey and Dargey Enterprises, LLC, c/o Kristine R. Wilson, The PSE Building, 10885 N.E. Fourth Street, Suite 700, Bellevue, WA 98004
Department of Public Works, c/o Robin S. Jenkinson, 123 Fifth Avenue, Kirkland, WA 98033

Concerning Further Review

The Kirkland Municipal Code includes no guidance on appeal of an Examiner's decision issued pursuant to KMC 25.23.080. However, the decision may qualify as a "Land use decision" under the Land Use Petition Act, Chapter 36.70C RCW, in which case the decision could be reviewed in King County Superior Court pursuant to the standards set forth in RCW 36.70C.130. A land use petition under Chapter 36.70C RCW must be filed within 21 calendar days of the issuance of a final land use decision. For more information on the judicial review process for land use decisions, see Chapter 36.70C RCW.